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DECISION



20450

**THE COMPTROLLER GENERAL
OF THE UNITED STATES**
WASHINGTON, D. C. 20548

P.L.-1
Boyle

FILE: B-203098.2

DATE: January 4, 1982

MATTER OF: English Electric Corporation

DIGEST:

1. Complainant contends that the awardee did not satisfy the solicitation's goal for participation of minority-owned firms because the awardee's subcontract with a distributor (minority-owned firm) serves no commercially useful function and cannot be counted toward satisfying the goal. Complaint is without merit because (1) the complainant has not shown that the distributor would not provide a service and (2) the fact that the awardee could have dealt directly with the manufacturer does not establish that the distributor's role is without commercial usefulness.
2. Complainant contends that the awardee did not satisfy the solicitation's goal for participation of female-owned firms because the awardee's subcontract with a fastener supplier (female-owned firm) serves no commercially useful function and cannot be counted toward satisfying the goal. Complaint is without merit because the record provides no basis to conclude that the awardee's proposed purchase of fasteners was excessive and unnecessary.
3. GAO need not consider the merits of a complaint concerning the commercial usefulness of certain minority-owned firms and a female-owned firm since the awardee satisfied the goals for such participation without considering the value of those subcontracts.

English Electric Corporation (EEC) complains against the award of contract No. CQ210 to Brown Boveri Electric, Inc. (Brown Boveri), by the Port Authority of Allegheny County, Pennsylvania, for certain electrical equipment to be used in connection with stage 1 of its light rail transit system. The contract is 80-percent funded by a grant administered by the Urban Mass Transportation Administration, Department of Transportation (UMTA).

EEC contends that Brown Boveri is not eligible for award because, in computing Brown Boveri's percentage of minority business participation, the grantee should not have counted Brown Boveri's expenditures to minority business enterprises (MBEs) that perform no commercially useful function in the work of the contract. UMTA contends that the grantee's subjective determination--that the Brown Boveri's MBE subcontractors perform a commercially useful function--should not be open to challenge. We find that EEC's complaint is without merit.

The Port Authority issued an invitation for bids (IFB) for the design, fabrication, testing, and delivery of six direct current rectifier units. To be eligible for award, bidders had to (1) subcontract at least 10 percent of the work to minority-owned firms and at least .1 percent of the work to female-owned firms or (2) be granted a waiver. EEC submitted the low bid in the amount of \$2,574,561 and Brown Boveri submitted the second low bid, \$22,405 higher than EEC's bid price. EEC requested a waiver from the MBE goals and Brown Boveri agreed to meet or exceed the MBE goals. The Port Authority denied EEC's request for a waiver under the conclusive presumption provision of the IFB because it determined that Brown Boveri's bid price was reasonable and that Brown Boveri satisfied the MBE goals.

EEC complained to the Port Authority contending, as it does here, that Brown Boveri did not satisfy the MBE goals because several of the minority-owned and female-owned subcontractors proposed by Brown Boveri performed no commercially useful function; in EEC's view, Brown Boveri's expenditures for those subcontractors should not be counted toward the MBE goals, thus rendering Brown Boveri ineligible for award. The Port Authority found that Brown Boveri's bid complied with all MBE requirements and denied EEC's complaint.

EEC appealed to UMTA. UMTA determined that the Port Authority had a rational basis for its finding. Then, EEC filed its complaint here.

The IFB provided that the "Port Authority or contractor may count toward its MBE goals only expenditures to MBEs that perform a commercially useful function in the work of the contract." The IFB advised that an MBE is considered to perform a commercially useful function when it is responsible for execution of a distinct element of the work of a contract and carrying out its responsibilities by actually performing, managing, and supervising the work.

To satisfy the 10-percent goal for minority-firm participation, Brown Boveri needed at least \$259,696 in subcontracts with minority-owned firms. Brown Boveri's bid indicated that it had subcontracts with minority-owned firms in the aggregate amount of \$275,827.

First, EEC challenges certain aspects of Brown Boveri's arrangement with Ruffins Motor Freight (Ruffins), a trucking firm, one of the minority-owned subcontractors. EEC charges that Brown Boveri is going to pay Ruffins' excessive shipping costs, in part, because all shipments are routed through Philadelphia. Ruffins' subcontract is worth \$35,010. EEC notes that six transformers are being shipped from St. Catharines, Ontario, to Pittsburg by way of Philadelphia. EEC estimates that this unnecessarily increases Brown Boveri's expenditure to Ruffins by \$3,000. EEC cites no other examples of excess.

In our view, transporting necessary supplies and equipment is unquestionably a commercially useful function. Whether the proposed route from St. Catharines to Pittsburg is commercially useful need not be decided by our Office because even if the amount of Brown Boveri's minority-firm subcontracts was reduced by \$3,000, Brown Boveri would still be eligible for award. Therefore, we conclude that this aspect of EEC's complaint is without merit.

Second, EEC challenges Brown Boveri's arrangement with Counsulere Enterprises, a minority-owned firm, in the amount of \$4,000 to provide consulting services concerned with MBE development. We need not address the merits of this aspect of EEC's complaint since if the amount of Brown Boveri's subcontracts with minority-owned

firms were reduced by the \$3,000 mentioned above and the \$4,000 involved here, Brown Boveri would still satisfy the IFB's goal for participation by minority-owned firms.

Third, EEC challenges Brown Boveri's proposed use of RPM Supply (RPM), a minority-owned firm, to act as Brown Boveri's agent to acquire six transformers. EEC states that Brown Boveri easily could have acquired these transformers directly from the manufacturer, which is Brown Boveri's customary practice, thus avoiding RPM's fee of \$47,200. EEC notes that without RPM's participation, Brown Boveri would not satisfy the goal for participation of minority-owned firms.

In response, Brown Boveri explains that the decision to purchase directly from the manufacturer or through a distributor is within its business discretion. Here, Brown Boveri chose to purchase through RPM, an agent of the manufacturer, in part, to increase the participation of minority-owned firms.

EEC has made no showing that RPM would not provide a service for its fee or that the transformers could have been purchased at a lower price from the manufacturer. The fact that Brown Boveri could have elected to deal directly with the manufacturer does not establish that RPM's role is without commercial usefulness.

In these situations, EEC has not shown that the MBE is not responsible for execution of a distinct element of the work or is not actually performing, managing, and supervising its work, as required by the IFB. Thus, this aspect of EEC's complaint is without merit.

To satisfy the .1-percent goal for participation of female-owned firms, Brown Boveri needed at least \$2,596.96. Brown Boveri's bid contained subcontracts with female-owned firms in the aggregate amount of \$3,800.

First, EEC challenges Brown Boveri's arrangement with Peerless Fastener (Peerless), a female-owned firm, to purchase six tons of nuts and bolts (fasteners) for \$2,600. EEC states that most parts are supplied with fasteners, so Brown Boveri need only purchase \$1,300

worth of fasteners from Peerless. In EEC's view, any purchase in excess of \$1,300 would serve no commercially useful function.

In response, Brown Boveri states that the amount of fasteners required is a business judgment within the contractor's discretion. Brown Boveri speculates that, as a matter of policy, Brown Boveri may seek more secure fastening than EEC does.

Aside from EEC's estimate and Brown Boveri's estimate, concerning the amount of nuts and bolts required, the record contains no evidence on the amount of fasteners reasonably required. We have no basis, therefore, to conclude that Brown Boveri's estimate of the amount of fasteners needed was excessive or other than a reasonable business judgment. Thus, we find no basis to sustain this aspect of EEC's complaint.

Because of this conclusion, we need not consider the merits of EEC's final contention--that the amount counted as MBE participation by a second female-owned subcontractor, Neshaminy Travel, should have been reduced from \$1,200 to \$407--because Brown Boveri would still satisfy the IFB's goal for participation of female-owned firms with only \$407 worth of services from that firm.

Accordingly, EEC's complaint is denied in part and dismissed in part.

Harry R. Van Cleave
For the Comptroller General
of the United States